**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **CAROLYN BERGSTROM** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,009,142 |
| **SPEARS MANUFACTURING COMPANY** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **ZURICH U.S. INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appeals the May 22, 2007 Award of Administrative Law Judge Thomas Klein. Claimant was found to be permanently and totally disabled as the result of injuries suffered on September 23, 2002. This matter was originally appealed to the Workers Compensation Board (Board) from the September 7, 2006 Award of Administrative Law Judge Thomas Klein. It was determined at that time that the ALJ had decided the matter without having considered the deposition of T. A. Moeller, Ph.D. The matter was remanded to the Administrative Law Judge (ALJ) for consideration of Dr. Moeller's deposition. The appeal in this matter is from the resulting Award of the ALJ.

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Larry D. Shoaf of Wichita, Kansas.

The Board has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on August 22, 2007.

## ISSUES

1. What is the nature and extent of claimant's injuries and disability? Claimant contends she is permanently and totally disabled as the result of a low back injury suffered on September 23, 2002, when she picked up a garbage can and experienced immediate pain in her low back. Respondent argues the medical information proves that claimant is capable of working at the light-duty job offered by

respondent. Respondent also argues claimant is malingering and intentionally creating the impression that she is incapable of performing work which has been offered by respondent and which the doctors have not restricted her from doing.

2. What is the amount of temporary total disability benefits that is due? Respondent raised this issue in its Application for Review to the Board. However, at oral argument to the Board, respondent stipulated that the issue regarding the amount of temporary total disability due is no longer in dispute.

## FINDINGS OF FACT

Claimant suffered an accidental injury arising out of and in the course of her employment with respondent when she lifted a garbage can on September 23, 2002. Claimant felt an immediate pain in her low back. She tried, but was unable to continue working. The injury was reported to Mike Morris, claimant's supervisor, and an accident report was filled out. Claimant was then moved to a light-duty job, sorting parts into baskets. The next day, claimant had trouble getting out of bed. She was sent by respondent to the Caney Clinic and was examined by nurse practitioner Janice Shippy. Claimant was provided pain medication and returned to work after two days. Initially, claimant was returned to the production janitor job, but was unable to perform this work. Two days later, she was moved to cleaning and separating parts, but was unable to do this job as well. Respondent then placed claimant on the job of "bar code". Claimant testified she could not do this job as it required her to have her arms extended and required standing, reaching and stretching, which caused her severe back pain.

Claimant was sent to the hospital for a CAT scan, which displayed mild L3-4 and L4-5 degenerative disc disease with disc bulging and posterior element hypertrophy and mild canal narrowing. Claimant was then referred by Ms. Shippy, the nurse practitioner, to orthopedic surgeon James W. Zeiders, M.D., for an examination on December 17, 2002. Claimant was taken off work on that date, and a myleogram was performed on December 20, 2002, which also showed degenerative changes of the facets of her lumbar spine and disc bulges at L3-4, L4-5 and L5-S1. Claimant was examined again by Dr. Zeiders on January 14, 2003, at which time she continued to display leg pain. EMG tests were ordered and revealed S-1 radiculopathy. Claimant was advised by Dr. Zeiders to sign up for Social Security disability as Dr. Zeiders did not think she could continue working. In reviewing the task list created by vocational expert Karen Terrill, Dr. Zeiders found claimant unable to perform 34 of 44 tasks, for a 77 percent task loss.

Claimant was referred by Dr. Zeiders to the Jane Phillips Medical Center in Bartlesville, Oklahoma, for pain management. Claimant underwent epidural injections

on at least two occasions, with no benefit. Claimant's treatment was then transferred by the insurance company to board certified orthopedic surgeon Anthony G.A. Pollock, M.D. Dr. Pollock, who saw claimant on two occasions, March 31, 2003 and May 21, 2003, performed a physical examination and took a history from claimant and referred her out for a functional capacities evaluation (FCE). The examiner performing the FCE found claimant's efforts to be inconsistent and to display significant symptom magnification. The test results from the FCE and from Dr. Pollock's evaluation elicited several inconsistent responses, which Dr. Pollock identified as being part of the Waddell test. Dr. Pollock identified the Waddell test, or Waddell signs, as being specific for malingering. In the grip strength test, claimant demonstrated zero muscle strength and zero grip strength. This indicated that claimant made no effort to grip the device. If claimant's grip strength were really zero, she would not have the strength required to hold a glass of water or write or grip a cane when she walked.

Dr. Pollock did opine that claimant was limited to sedentary to light work. Claimant could not return to her original job as a janitor. Dr. Pollock went on to state, however, that claimant is capable of substantial and gainful employment. Dr. Pollock was shown a videotape of the job identified as bar coding and stated that claimant would be able to do that job. Dr. Pollock rated claimant at 5 percent permanent partial whole body disability, noting claimant had a positive EMG study. However, he stated the CT scan and myleogram did not confirm any significant problems. Dr. Pollock found claimant to be at maximum medical improvement (MMI) on June 18, 2003. In reviewing the task list created by vocational expert Dan Zumalt, Dr. Pollock found claimant unable to perform 13 of 42 tasks, for a 31 percent task loss.

On December 3, 2003, the parties appeared before the ALJ at a preliminary hearing. The ALJ asked claimant if she was capable of returning to work at a light-duty position. The ALJ was informed claimant was returning to respondent's plant the day following the hearing in an accommodated position. On December 4, 2003, claimant returned to respondent's plant and attempted to perform the bar code job. This was the same job claimant was doing when Dr. Zeiders took her off work. It is also the same job videotaped and reviewed by Dr. Pollock. Claimant only performed the job for approximately three hours before she went home complaining of pain in her leg and back. Claimant testified at regular hearing that this job required too much standing, reaching and stretching. She said that the job forced her to work with her arms extended, and that increased her pain level.

Claimant was referred by her attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., on January 6, 2004, for the first of two examinations. Dr. Prostic

obtained a history from claimant, indicating she had no past low back problems. X-rays taken in his office indicated disc space narrowing at L5-S1 and posterior facet arthrosis. An MMPI[1] was performed on claimant at Dr. Prostic's direction. He diagnosed claimant with an injury to her low back and opined she probably has psychologically decompensated subsequent to her injury. He stated that she would more likely improve if treated by a psychotherapist rather than a surgeon. It is noted that no health care provider has recommended surgery for claimant. He rated claimant at 18 percent permanent partial disability to the whole body pursuant to the fourth edition of the AMA *Guides*.[2] Dr. Prostic opined that this impairment was a result of the September 23, 2002 injury, and he utilized the range of motion table rather than the DRE. From an orthopedic standpoint, claimant was capable of light duty, but when the psychological aspect was added, claimant was totally disabled from gainful employment. After reviewing the task list prepared by vocational expert Karen Terrill, Dr. Prostic opined claimant had lost the ability to perform 15 of 44 tasks, for a 34 percent task loss. As of the second examination on May 11, 2005, claimant's examination was "less good".[3] Claimant was reporting increased pain and tenderness, and a decrease in her range of motion, and the left ankle reflex was decreased. Dr. Prostic acknowledged the FCE indicated claimant was magnifying her symptoms. He stated that "her clinical picture was far worse than one would expect from a typical person described by the range of motion model."[4] On redirect examination, Dr. Prostic described the FCE as a waste of time and money, as patients with claimant's MMPI profile would be expected to be self limiting. Dr. Prostic was also shown the videotape of the bar coding job. He ultimately stated that claimant would be able to do the job as long as claimant had the ability to change position as needed.

Claimant was referred by Administrative Law Judge John D. Clark, to clinical psychologist Theodore Allen Moeller, Ph. D., for independent psychological evaluations on May 13, 2004, and September 21, 2004. Dr. Moeller explained the reason for the delay between the sessions was due to claimant's being out of town. Dr. Moeller administered several psychological tests to claimant, with the end result being that there was some probability of malingering. However, Dr. Moeller did express a desire to do more testing to verify or rule out this diagnosis. In his report of October 5, 2004, Dr. Moeller stated "the probability of malingering is quite definite in this profile".[5]

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[1] MMPI stands for "Minnesota Multiphasic Personality Inventory."

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[3] Prostic Depo. at 20.

[4] *Id*. at 25-26.

[5] Moeller Depo. at 52 and Ex. 2.

Claimant was referred by respondent's attorney to board certified internal medicine and occupational medicine specialist Chris D. Fevurly M.D., for an examination on April 4, 2005. Dr. Fevurly performed a physical examination of claimant, finding a less than complete effort during the examination. Claimant failed to put forth a good effort during the Jamar dynamometer testing and demonstrated inconsistent range of motions in her back. Claimant did display degenerative disc disease on the MRI and did have an abnormal left leg EMG test, but had no muscle atrophy, loss of deep tendon reflex or motor deficit in the distribution of the nerve roots. Dr. Fevurly identified preexisting degenerative changes in claimant's lumbar spine. He found her preexisting changes had been aggravated by the work event. In rating claimant, he found her to fit into Category III of the lumbosacral impairment under the fourth edition of the AMA *Guides*,[6] Table 72, page 110. This would result in a 10 percent permanent partial whole body impairment. However, he stated that only 5 percent of her current impairment was the result of her work-related injury. The remainder was preexisting. When shown the videotape of the bar code job, Dr. Fevurly stated that claimant was qualified to perform that job, but could not stand constantly. Claimant needed to get off her feet 5 to 10 minutes per hour. Dr. Fevurly agreed that claimant would not be able to return to the janitorial job. Dr. Fevurly reviewed the task list of Dan Zumalt, finding claimant unable to perform 2 of 42 tasks, for a 5 percent task loss.

Mike Morris, respondent's production supervisor, was claimant's supervisor on September 23, 2002, when she suffered the injury. Mr. Morris is familiar with the bar code job, since he has done that job in the past. He acknowledged that a person could either sit or stand while doing that job and there is no bending or twisting involved in doing that job. He also acknowledged that the bar coding job would be available for claimant should she desire to return to work for respondent. Claimant's employment records indicated that she returned to work at the bar code job on December 4, 2003, and worked for a short period of time, arriving at 8:00 a.m. and leaving at 10:30 a.m. Claimant failed to call in on December 5, 2003, and never came back to respondent.

A letter dated December 9, 2003, from Geoff Collins, respondent's plant manager, was sent to claimant, offering her a return to work within the restrictions of Dr. Pollock. Mr. Morris identified the job described in the December 9, 2003 letter to claimant as the bar code job. The letter was specific in that claimant could sit or stand to do the job and no twisting or bending was needed to perform the job. A videotape of the bar code job was created by Paul Richard Mueller, an employee of respondent. The videotape was shown to several health care providers in this matter and placed into evidence as Exhibit A to the Mueller deposition. Claimant failed to respond to the letter and was terminated on December 18, 2003. Claimant testified that the bar code job was outside her work

[6] AMA *Guides* (4th ed.).

restrictions.[7] Claimant began receiving Social Security disability on July 16, 2003. Claimant has not looked for work since being terminated by respondent.

## PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[8]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[9]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[10]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[11]

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.[12]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his

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[7] R.H. Trans. at 26.

[8] K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

[9] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[10] K.S.A. 44-501(a).

[11] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[12] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

> employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[13]

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[14]

K.S.A. 44-510e also states,

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[15]
>
> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[16]

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[17] and *Copeland.*[18] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an

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[13] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[14] K.S.A. 44-510e(a).

[15] K.S.A. 44-510e(a).

[16] K.S.A. 44-510e.

[17] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[18] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[19]

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.[20]

Claimant was provided functional impairment ratings from three health care providers. The Board finds no justification to give greater weight to the opinion of Drs. Prostic, Fevurly or Pollock. The Board, therefore, averages the 18 percent opinion of Dr. Prostic with the 5 percent ratings of both Dr. Fevurly and Dr. Pollock and awards claimant a 10 percent whole body permanent partial disability on a functional basis for the injuries suffered on September 23, 2002.

Likewise, claimant has been provided with four opinions regarding the appropriate task loss suffered from this injury. Both Dr. Zeiders and Dr. Prostic reviewed the task list provided by Karen Terrill. Dr. Zeiders found claimant unable to perform 34 of 44 tasks for a 77 percent task loss. Dr. Prostic found claimant unable to perform 15 of the 44 tasks on the list for a 34 percent task loss. Both Dr. Pollock and Dr. Fevurly reviewed the task list of Dan Zumalt, with Dr. Pollock finding claimant unable to perform 13 of 42 tasks for a 31 percent loss, and Dr. Fevurly finding claimant unable to perform 2 of 42 tasks for a 5 percent task loss. In considering all the opinions in this record, the Board finds claimant to have suffered a 37 percent task loss pursuant to K.S.A. 44-510e.

The ALJ found claimant to be permanently and totally disabled from the injuries suffered on September 23, 2002. The Board does not agree with that assessment. Only Dr. Zeiders was unequivocal in finding claimant to be permanently and totally disabled. Even Dr. Prostic, claimant's hired expert, only assessed claimant an 18 percent whole body impairment resulting from the physical injuries suffered with respondent. It was only when adding the psychological component that Dr. Prostic found claimant to be permanently and totally disabled. Regarding claimant's psychological state, the opinion of Dr. Moeller, that claimant displayed a strong component of malingering, is more convincing to the Board

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[19] *Id.* at 320.

[20] K.S.A. 44-510c(a)(2).

than the opinion of Dr. Prostic. Several medical and psychological opinions in this record question claimant's efforts during both physical and psychological testing. Claimant does not convince the Board that she exerted full effort in this matter.

Respondent made it clear the job of bar coding was and is available to claimant. Claimant's attempts to return to that job appear disturbingly similar to her attempts during the physical and psychological testing. Her giving less than full effort and a less than sincere attitude regarding the bar code job cloud claimant's request for permanent total disability. Claimant's description of the job and the physical requirements of the job do not agree with the description of the job or the videotape of the job contained in this record. Plus, three health care providers, Dr. Pollock, Dr. Fevurly, and even Dr. Prostic, claimant's expert, agree claimant is physically able to perform the bar code job. The logic and policies of *Foulk* and *Copeland* require a good faith effort be exerted when considering post-injury job searches. The Board does not find that claimant put forth a good faith effort with regard to the bar code job. As such, pursuant to K.S.A. 44-510e, the wage claimant would have earned from that job must be imputed to claimant. As that wage would have been in excess of 90 percent of the wage claimant was earning on the date of accident, claimant is limited, pursuant to K.S.A. 44-510e, to her functional impairment of 10 percent.

## CONCLUSIONS

The Board finds the Award of the ALJ should be modified to award claimant a 10 percent permanent partial disability to the whole body on a functional basis for the injuries suffered on September 23, 2002, but that claimant should be denied additional award for any permanent partial work disability.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas Klein dated May 22, 2007, should be, and is hereby, modified to award claimant a 10 percent permanent partial disability to the body as a whole on a functional basis.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Carolyn Bergstrom, and against the respondent, Spears Manufacturing Company, and its insurance carrier, Zurich U.S. Insurance Company, for an accidental injury which occurred on September 23, 2002, and based upon an average weekly wage of $369.08, for 34 weeks of temporary total disability compensation at the rate of $246.07 per week or $8,366.38, followed by 39.6 weeks permanent partial disability compensation at the rate of $246.07

per week or $9,744.37 for a 10 percent permanent partial whole body functional disability, making a total award of $18,110.75.

As of the date of this Order, the entire amount would be due and owing, and ordered paid in one lump sum, minus amounts previously paid.

Although the ALJ's Award approves claimant's contract of employment with her attorney, the record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.[21]

**IT IS SO ORDERED.**

Dated this ____ day of September, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Larry D. Shoaf, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[21] K.S.A. 44-536(b).